Supreme Court, U.S.
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No. 91-121

In the Supreme Court of the United States

OCTOBER TERM, 1991

DUSKIN CLAUDE BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order suppressing evidence on the ground that the search warrants for his residence did not authorize agents to destroy a concrete slab in his yard.

1. On January 4, 1990, petitioner was indicted by a grand jury sitting in the United States District Court for the District of Oregon. He was charged in a superseding indictment with conspiring to commit and conceal the offenses of manufacturing methamphetamine, possessing the drug with intent to distribute it, and distributing methamphetamine, in violation of 21 U.S.C. 846; and with

two counts of manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1).

Petitioner moved to suppress evidence seized by government agents in the execution of search warrants for his residence. The agents found the evidence under a concrete slab by using a jackhammer. On February 12, 1990, the district court suppressed the evidence on the ground that "[t]he search was obviously very intrusive in nature." Pet. App. A11-A12.

The court of appeals reversed. Pet. App. A1-A10. The court held that, under the circumstances of this case, the use of a jackhammer to search beneath the concrete slab was reasonable. The court said that "while the destruction of property in carrying out a search is not favored, it does not necessarily violate the fourth amendment." Pet. App. A8-A9. The court noted that before jackhammering the concrete slab, the agents found evidence of the manufacture of methamphetamine in the shop next to the slab; the agents knew the slab had been poured very recently, shortly after a warrant had been executed for the house of one of petitioner's associates; and the shop appeared to have been recently and hastily repainted and repaired. *Id.* at A4. Under these circumstances, the court held that the search technique, which might have been intolerably intrusive in other circumstances, was not unreasonable. *Ibid.*

2. Petitioner contends (Pet. 4-5) that the Fourth Amendment was violated because the use of a jackhammer to search beneath his driveway for residue of methamphetamine exceeded in scope and intensity the bounds set by the warrants. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of

appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.